

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SANGER UNIFIED SCHOOL DISTRICT,)	
)	
Employer,)	Case No. S-UM-389
)	
and)	PERB Decision No. 752
)	
CALIFORNIA SCHOOL EMPLOYEES)	June 30, 1989
ASSOCIATION CHAPTER #153,)	
)	
Exclusive Representative.)	
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Appearances; Finkle & Stroup by Daniel G. Stevenson, Attorney, for Sanger Unified School District; Douglas W. Kessler, Field Representative, for California School Employees Association Chapter 153.

Before Hesse, Chairperson; Porter, Craib, Shank and Camilli, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (Board or PERB) on exceptions filed by the Sanger Unified School District (District) to the proposed decision of a PERB hearing officer. The hearing officer dismissed the District's unit modification petition, holding that, although the District did show a change in circumstances, those changes were not sufficient to render the positions that the District sought to exclude as supervisory. For the reasons set forth below, we order that the unit modification petition be granted and the positions of Food Service Supervisor I, II, and III be excluded from the bargaining unit.¹

¹In the unit modification petition, the District also sought to exclude the position of Lead Custodian-High School. CSEA withdrew its opposition to the deletion of this position during a PERB settlement conference on September 28, 1987.

FACTUAL SUMMARY

The California School Employees Association (Association) was recognized as the exclusive representative of classified employees in the District in 1976. The unit included various cafeteria workers, including Cafeteria Managers I, II, and III. As a result of a reclassification study conducted in 1986, the cafeteria manager position was retitled Food Service Supervisor I, II, and III.² On June 9, 1987, the District filed its unit modification petition seeking to exclude all food service supervisor positions from the bargaining unit. The District argued that, pursuant to PERB Regulation 32781, subdivision (b)(1),³ there had been a change in circumstances warranting the exclusion of the positions as supervisory.

From 1976 until 1987, the District's food service program was supervised by the Director of Food Services (Director). During that time the position was filled by two people: Anne

²In 1986, a reclassification study was conducted by the District. The titles and written job descriptions of food service workers were changed. While evidence was introduced regarding the change in job descriptions, the hearing officer did not rely on that evidence in reaching her decision. The District does not except to the failure to give weight to this evidence.

³Regulation 32781, subdivision (b)(1) provides:

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination:

(1) To delete classifications or positions no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit.

Collins, from 1976 to 1984, and Carol Wilkinson, from 1984 to 1987. In 1987, the District hired an outside agency to manage its food services operations. Prior to contracting with the outside agency, the District's chain of command in Food Services flowed from the Assistant Superintendent for Business to the Director,⁴ the Food Service Supervisor, and the Food Service Assistant.

At the time of the hearing, there were seven food service supervisors in the District,⁵ and between two and eleven food service assistants in each school site. The food service supervisors oversee the food service operations at the assigned site. In general, they prepare, serve and store food, maintain kitchen equipment and supplies and, where appropriate, oversee the transport of prepared food to the satellite operations.

The changes to which the District points, in support of its petition to exclude the food service supervisors, took place upon the arrival of Wilkinson as the Director. Wilkinson appears to have had a less "hands-on" supervisory style than her predecessor, Collins. During her tenure, Wilkinson instituted three significant changes. First, she only visited the school sites once or twice a month, rather than the daily visits by her

⁴This position is no longer held by a District employee; the outside agency oversees the food service operations and food service workers report to this agency and to the District.

⁵The classifications of Food Service Supervisors I, II, and III relate to the size of the school to which the food service supervisor is assigned and whether the position requires servicing satellite operations.

predecessor. Second, unlike Collins, she did not sit in on the evaluation sessions of the food service assistants (though they were still sent to the Director for review); thus, though food service supervisors had always been involved in evaluations, they now have a more significant role. Third, she changed the procedure for securing substitutes for the kitchen. During Collins' tenure, the Director generally called substitutes from the District's eligibility list, after being informed by the food service supervisor of the need for a substitute. Wilkinson turned this responsibility over to the food service supervisors.⁶

The District also introduced evidence of the other duties of the food service supervisors which it contends supports its petition for unit modification. Primarily, it relies on the participation of the food service supervisor in the hiring of food service assistants. The food service supervisors participate in interviewing potential food service assistants and, on at least some occasions, recommend successful candidates

⁶The testimony from the District and the Association differed as to the reason for this change. Wilkinson testified that she turned the responsibility over to the food service supervisors because they had complained about the Director's selection of substitutes. The Association's witnesses testified that the prior policy was changed because Wilkinson lived in Fresno and calls to Sanger to secure substitutes was long distance. Regardless of the reason, if the change affected the supervisory nature of the food service supervisor position, such change should be considered as part of the circumstances warranting exclusion.

for hire.⁷ The interviews usually involve a panel of three: the Director, another administrator and the food service supervisor. The panel members ask a series of prepared questions. The food service supervisor is then either asked for a recommendation or requested to fill out an evaluation sheet ranking the candidates. The evidence is conflicting on whether the recommendations are always adopted. Wilkinson testified that she did not participate in the selection process after her first year, that she left the decision to the discretion of the food service supervisors; however, the record reflects that the District did not hire any food service assistants after 1985. The testimony of the only two food service supervisors called as witnesses indicated that they had each participated in the selection of at least one food service assistant. Joyce Hobson testified that approximately five years prior to the hearing, she had participated on a panel, made a recommendation, and the person she recommended had been hired. Billie Deaver testified that she sat in on several panels, that she was given an evaluation form to rank the participants, and that her top choices were not always selected.⁸ The record reveals that, whatever the role the food service

⁷The most recent hiring of food service assistants was in 1985 (1) and 1984 (3).

⁸Both food service supervisors were quick to point out that they did not feel that they had any authority in the hiring process. Even though Hobson's selection was hired, she did not believe that it was necessarily on the strength of her recommendation. Deaver indicated that the reason that her top candidates may not have been selected was because of the merit system.

supervisors had in hiring, their input remained the same through both Directors' tenures.

The food service supervisors also maintain a monthly employee absence record for the employees at the site and submit it to the Director at the end of the month. All classified employees fill out individual absence report forms and return them to the District. Food service supervisors do not have the authority to grant overtime. The food service supervisors are responsible for receiving food deliveries and can order selected items from District-authorized vendors on an as-needed basis. They participate in an annual session to establish menus and have some limited input to adjust the District-prepared menus for their site.⁹ They have no input on the selection of vendors. There was no evidence presented that any of these job duties were a result of a change in District policy; rather, they appear to have always been the responsibility of food service supervisors.

THE PROPOSED DECISION

The hearing officer relied on the three areas in which the food service supervisors duties changed as a result of Wilkinson's change in policy. She concluded that, although a change occurred, the changes were insufficient to warrant an exclusion of food service supervisor from the classified unit. She found that, although Wilkinson visited the sites far less frequently than her predecessor, nothing was presented to

⁹Hobson testified that she had a nearly impossible time removing an item from her menu despite repeated requests.

indicate that this really resulted in more autonomy to the food service supervisors. As to the hiring of substitutes, she held that the exercise of this duty was "severely constrained due to the fact that they must call only those persons on the District eligibility list." She concluded that this duty was of a routine clerical nature and did not require the use of independent judgment. Finally, as to the evaluation process, she found that, although Wilkinson did not personally participate in the process, she continued to review the evaluations and, on at least one occasion, modified an evaluation. She rejected the emphasis the District placed on this duty. She held that the record did not reflect that the District relied on the evaluations for any purpose which affects the terms and conditions of employment for food service employees.

THE EXCEPTIONS

The District excepts to the hearing officer's findings/conclusions that: 1) it is unclear what weight was to be given to the recommendation of the food service supervisors in the decision-making process; 2) the District did not support its assertion that, by visiting the kitchens less frequently than her predecessor, Wilkinson gave the food service supervisors more responsibility and opportunity to exercise independent judgment; 3) the record does not establish that the evaluations have been relied upon by the District for any purpose which affects the terms and conditions of employment of food service employees; and

4) calling their own substitutes is clearly a routine clerical task not requiring independent judgment. The District also excepts to the ALJ's failure to find that the food service supervisors were "statutory supervisors" based on their oversight at the food service operations at their assigned sites, preparation of various reports and records, overseeing preparation and delivery of food to satellite locations, working three more days per year than do food service assistants, and being paid at a higher salary range on the salary schedule.

DISCUSSION

The District contends that the food service supervisors are no longer appropriate to the classified unit because they are "supervisors" within the meaning of the Educational Employment Relations Act (EERA or Act).¹⁰ Section 3540.1, subdivision (m) of the Act provides:

"Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board has held that, since section 3540.1, subdivision (m) is written in the disjunctive, an employee need only perform

¹⁰EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

or effectively recommend one of the enumerated functions or duties to be found to be a supervisor. (Sweetwater Union High School District (1976) EERB Decision No. 4, at p. 12.)¹¹

The Board has, through regulation, afforded the parties two opportunities to delete classifications or positions which are inappropriate to the unit. The first, Regulation 32781, subdivision (b)(1), permits the exclusions of inappropriate classifications where the party can show changed circumstances.¹² The second, Regulation 32781, subdivision (b)(4),¹³ provides for

¹¹Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

¹²See footnote 2 for complete text of Regulation 32781, subdivision (b)(1).

¹³Regulation 32781, subdivision (b)(4) provides:

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination:

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(4) To delete classification(s) or position(s) not subject to (1) above which are not appropriate to the unit because said classification(s) or position(s) are management, supervisory, confidential, not covered by EERA, HEERA or Ralph C. Dills Act, or otherwise prohibited by statute from inclusion in the unit, provided that:

(A) The petition is filed jointly by the employer and the recognized or certified employee organization, or

(B) There is not in effect a lawful written agreement or memorandum of understanding, or

(C) The petition is filed during the "window period" of a lawful written agreement or

unit modification, absent changed circumstances, under limited conditions. The facts of this case are appropriately analyzed under Regulation 32781, subdivision (b)(1).

In Atascadero Unified School District (1981) PERB Decision No. 191, at p. 5, the Board's first case dealing with changed circumstances which warrant exclusion of supervisory positions,¹⁴ the Board affirmed the ALJ's finding that head custodians and kitchen managers were no longer appropriate to the unit.

Atascadero involved rather unique circumstances. The district and the union stipulated that the positions involved in the unit modification petition were supervisory. Thus, the only question before the Board was whether there were changed circumstances to warrant modification. The Board found that: both positions began evaluating subordinate employees, and that such evaluations were the only ones received by the employees; both positions effectively hired employees; head custodians effectively recommended dismissal of employees and that kitchen managers had the authority to dismiss. On the basis of these changes, the Board granted the unit modification petition. One comment by the

memorandum of understanding as defined in these regulations in section 33020 for EERA, 40130 for Ralph C. Dills Act or 51026 for HEERA.

(As amended, February 1, 1989)

¹⁴PERB's regulations were revised, effective February 14, 1983. Regulation 32781, subdivision (b)(1) was formerly numbered at 32761, subdivision (b). There were no substantive changes to the regulation. The regulations have been recently revised, effective February 1, 1989. Regulation 32781, subdivision (b)(1) was not substantively changed.

Board deserves mention. Relying on section 3545, subdivision (b), the Board stated:

[i]n addition to the fact that there are changed circumstances, we would exclude the employee classifications in question because it is clearly inappropriate to include supervisory classifications within the established unit.

(Ibid. at p. 5, emphasis added.)

Another decision in which the Board granted a petition for unit modification to exclude supervisory employees, and the decision relied upon by the District, is Antioch Unified School District (1984) PERB Decision No. 415. In Antioch, the Board adopted the findings of fact and conclusions of law of the ALJ. (Ibid. at p. 2.) Although there was significant discussion regarding the effect of the revision of PERB's regulations¹⁵ in the Board's decision, there was no discussion of the changes in the duties of the food service cook managers warranting an exclusion of that position under Regulation 32781, subdivision (b)(1). Even though the decision clearly rests on Regulation 32781, subdivision (b)(1), the analysis focuses on all of the duties of food service cook managers, not merely those which changed following the initial unit determination. The Board considered the following factors when it determined that food service cook managers were supervisory: they used independent judgment to choose a candidate to fill vacant food service

¹⁵The union argued, inter alia, that, because the petition was filed under the previous regulation (see supra fn. 13), the petition was invalid.

assistant positions (the manager independently selected from the top three ranks on the eligibility list); they exercised supervisory authority by assigning work to employees in their kitchens; they determined whether substitute employees were needed and if extra hours were required; they exercised the only authority on site and were not subject to substantial review or prior approval to carry out day-to-day operations and; finally, the Board found that evaluating employees was indicative of supervisory status. (Ibid, at pp. 8-9 of attached ALJ Proposed Decision.) The Board noted, however, that participation on a promotional interview panel does not "achieve a dimension of 'hiring' or 'effectively recommending' hiring under Board precedent." (Ibid, at pp. 9-10.)

The District argues that its food service supervisors perform many, if not all, of the tasks that the Board approved of in Antioch. First, it argues that, like the food service cook managers in Antioch, the food service supervisors participate on an interview panel where they effectively recommend hiring of assistants. On this issue, the District misreads the facts in Antioch. The discussion of interview panels in Antioch pertained only to promotional interviews for assistants and the Board expressly held that such participation did not amount to hiring or effectively recommending hiring. The Board, in Antioch, instead relied upon the food service cook manager's selection of substitutes from the top three ranks of an established eligibility list; since all food service assistants had

originally been hired as substitutes, the Board considered this as effectively recommending hiring. Furthermore, the testimony was conflicting as to whether the hiring recommendations were always accepted by the District. (See discussion supra at pp. 3-4.)

Second, the District argues that, because Wilkinson limited her visits to once or twice a month, the food service supervisors effectively manage the day-to-day operations of the kitchens. To support this assertion, the District relies on the following facts: food service supervisors are allowed to vary the hours of assistants (but not assign overtime); they are responsible for deliveries and ordering bread, candy, milk, and popcorn from District-approved vendors; they assign assistants food preparation, serving and cleanup tasks; and they have input into the creation of the menus for their site. They correctly argue that these are very similar to the factors relied upon by the Board in Antioch.

Third, the District asserts that the evaluation process is similar to the criteria in Antioch. We find that the procedure is markedly similar. The only difference is the finding in Antioch that the director never changed an evaluation. In the present case, Wilkinson did amend one evaluation to include information received subsequent to the evaluation. We do not consider this a substantial difference. Wilkinson testified that the food service supervisors recommend permanent status for probationary employees and those recommendations were never

overruled. The Association presented no rebuttal to this testimony.

Finally, the District contends that the ALJ erred in concluding that the food service supervisors only perform a clerical function when they call substitutes from the District's eligibility list. Wilkinson testified that the list was only a starting place, and that the food service supervisors can call whomever they chose. That testimony is corroborated only by a single incident testified to by Hobson. Hobson stated that once, when she could not obtain a substitute from the list, she was given permission by Wilkinson to call someone she knew. Hobson and Deaver both testified that they were expected to call off the eligibility list. There is nothing in the record to indicate whether the food service assistants have all been substitutes, thus, satisfying the criteria set forth in Antioch.

The Board is presented with a very close case here. We are called upon to determine whether the changes in circumstances, since the initial establishment of the unit, are sufficient to change the status of the food service supervisors and exclude them from the unit. In other words, are the changes which resulted from Wilkinson's management style, coupled with the preexisting duties of the food service supervisors, sufficient to warrant exclusion from the unit?

The District's primary argument is that the food service supervisors utilize independent judgment in effectively recommending hiring. A close review of Antioch reveals that the

Board has rejected mere participation on an interview panel as evidence of "hiring" or "effectively recommending" hiring. Although Wilkinson contends that she no longer participated on interview panels and that the decision was left to the food service supervisor, the record reveals that there have been no hiring decisions since 1985. The only testimony indicated that food service supervisors participated on panels and made recommendations. This argument must, therefore, be rejected.

However, the other arguments put forth by the District are persuasive. The District's remaining evidence in support of supervisory status is the on-site authority: assigning and directing work, making emergency substitutions on the menu, receiving deliveries, ordering some foodstuffs from District-approved vendors, participating in meetings to establish menus, determining when substitutes are needed and calling from the District's list, and evaluating employees.

Although there was a lack of specific evidence as to the increased autonomy of the food service supervisors due to Wilkinson's infrequent presence on site, such increased autonomy is self-evident, given the fact that the food service supervisors are indisputably in charge in the absence of the Director. Furthermore, as noted above, their duties are very similar to those found significant in Antioch.

We also find the change in the evaluation process significant. As the Board found in Antioch, conducting evaluations is indicative of supervisory status, it obviously can

have a profound effect upon promotion and firing, two factors expressly mentioned in section 3540.1, subdivision (m).¹⁶ While being on an evaluation panel is of no greater import than being on a hiring panel, the food service supervisors now do the evaluations themselves, subject to the review of the Director. Thus, their role has been greatly expanded.

The food service supervisors' involvement in selecting substitutes is also of some significance. Choosing someone from an eligibility list is not just a clerical function; some independent judgment is required as long as a choice must be made among several eligible candidates. After all, the same type of action is all that is required to hire a permanent employee. While the food service supervisors' independent judgment is confined to the arguably less important realm of hiring substitutes, it is nevertheless hiring of a sort and, thus, is some indication of supervisory status.

We conclude that the food service supervisors' increased on-site authority and greater involvement in evaluations and the hiring of substitutes constitute changed circumstances sufficient to make their continued inclusion in the rank and file unit inappropriate.

¹⁶For complete text of section 3540.1, subdivision (m), see page 8.

ORDER

The unit modification petition filed by the Sanger Unified School District is GRANTED. Food Service Supervisors I, II, and III shall be excluded from the unit. Accordingly, an amended unit certification will be issued.

Members Shank and Camilli joined in this Decision.

Member Porter's concurrence begins on p. 18.

Porter, Member, concurring: I concur that the unit modification petition should be granted with respect to the Food Service Supervisor I, II and III classes in that the record demonstrates that there has been a change in circumstances and that said classes are now supervisory and no longer appropriate to the bargaining unit.

The unit modification petition before us seeks not only the deletion of the food service supervisor classes from the bargaining unit on the basis of change in circumstances and supervisory status, but also that of the Lead Custodian-High School class. The record before us shows that, in responding to the unit modification petition, the exclusive representative opposed deletion of the Lead Custodian-High School class on the grounds that there had been no change in circumstances and that the class was still appropriate to the bargaining unit. The proposed decision also indicates that, prior to the hearing on this unit modification petition, the employer and the exclusive representative "informally stipulated" that the Lead Custodian-High School class could be deleted from the unit. The record shows no determination by the Public Employment Relations Board (Board) agent on the petition regarding the Lead Custodian-High School class, nor does the record before us contain any evidence or stipulated facts with respect to any changed circumstances and supervisory status of the Lead Custodian-High School class whereby this Board can make any such determination. Accordingly, I would remand that portion of the unit modification petition

concerning the Lead Custodian-High School class to the Board agent for further investigation and/or hearing in order that such a determination may be made.

Chairperson Hesse joined in this Concurrence.